

The Second Division consisted of the regular members and in addition Referee Nancy Connolly Fibish when award was rendered.

(International Association of Machinists and
(Aerospace Workers
PARTIES TO DISPUTE: (
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

1. That the Chicago and North Western Transportation Company (hereinafter referred to as the "Carrier") violated the applicable provisions of Rule 35 of the July 1, 1921 Joint Agreement as specifically amended by Agreement dated July 1, 1979 when, subsequent to an investigation which was neither fair nor impartial it unjustly and improperly dismissed from service M-19-A Chicago Diesel Shop Machinist Helper E. Brown (hereinafter referred to as the "Claimant") from service.

2. That accordingly, the Carrier be ordered to

(a) Restore Claimant to service with all seniority and vacation rights unimpaired.

(b) Compensate Claimant for all time lost from service commencing February 22, 1990.

(c) Make Claimant whole for all health and welfare and insurance benefits lost while dismissed from service.

(d) Expunge from Claimant's personal record any and all reference to the investigation proceedings and the discipline subsequently imposed.

FINDINGS:

The Second Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On February 7, 1990, Claimant, who had been employed by the Carrier since September 1973, was working as Hostler Helper in the M-19-A Diesel Shop located in Chicago, Illinois, primarily assigned to assist in the movement of locomotives in and around the M-19-A Diesel Shop. On that date he and the Hostler with whom he was assigned, were instructed by their Foreman to remove diesel Locomotive #155, which had been cleared for service and running, from the west end of Track 3 (a service line) in Building M-19-A. Locomotive #155 was the end locomotive in a series of three (3) uncoupled and free standing locomotives; Locomotive #400 was behind Locomotive #155, and behind #400 was Locomotive #134. After the locomotive was moved in a westerly direction, away from Locomotives #400 and #134, a pipefitter who had been working on Locomotive #134 complained to the Foreman that Claimant had moved Locomotive #155 while a blue flag with attached name tags remained in place on Locomotive #134. Claimant was called into the Shop Superintendent's office about the complaint that same afternoon and was issued a formal notice on February 8 advising him to appear for Investigation at 10:00 A.M. on February 9, 1990, to answer the charge that he had violated Rule 26 when he removed the blue flag protection from Track 3 and directed the movement of Locomotive 155 from that track. At Organization's request, the Investigation was rescheduled to February 15, 1990. After the February 15 Investigation the Claimant was informed, in a discipline notice that was dated February 22, 1990, that he was found guilty of violating Rule 26 and was dismissed from the service. Portions of Rule 26 read as follows:

"(1) A blue signal signifies that workmen are on, under or between rolling equipment [which] must not be coupled to or moved, except as provided in [sections] (5) or (6) of this rule.

Rolling stock must not pass a blue signal. Other rolling equipment must not be placed on the same track so as to block or reduce the view of the blue signal, except on designated engine servicing area tracks, car shop repair area tracks or when a derail is used to divide a track into separate working areas. When a blue signal is displayed at the entrance to a track, rolling equipment must not enter that track.

Blue signals must be displayed by each craft or group of workmen who are to work on, under or between rolling equipment. They may be removed or the display discontinued only by the same craft or group who placed them.

When blue signal protection has been removed from one entrance of a track with a switch at each end or from either end of rolling equipment on a main track, that track is no longer under blue signal protection.

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(5) An engine must not enter a designated engine servicing area track under the exclusive control of mechanical forces unless blue signal protection governing entry is removed. The engine must stop short of coupling to another engine.

An engine must not leave a designated engine servicing area track unless blue signal protection is removed from that engine and from the track in the direction of movement.

Blue signal protection removed from track for the movement of such engines must be restored immediately after the engine has entered or has cleared the area.

An engine protected by blue signals may be moved on a track within the designated engine servicing area under the exclusive control of mechanical forces when operated by an authorized employee under the direction of the employee in charge of workmen and after the blue signal has been removed from the controlling engine to be repositioned and the workmen have been warned of the movement.

(6) Rolling equipment protected by blue signals on car shop repair tracks which are under exclusive control of car department forces may be repositioned with a car mover when operated by an authorized employee under the direction of the employee in charge of the workmen and after the workmen have been warned of the movement."

The Organization contends that the Carrier violated Rule 35, portions of which require a fair hearing before an employee can be disciplined and require at least five days notice of the investigation. Specifically, it contends the Carrier did not provide Claimant with a fair and impartial investigation, failed to sustain the charge with probative evidence, and therefore improperly dismissed the Claimant from service.

While management was precipitate in scheduling a Hearing in less than five days after the incident giving rise to the charge, it did reschedule the Hearing at the Organization's request and therefore cannot be held in violation of Rule 35 in this respect. The Board has examined the documents pertaining to the Hearing and, while the Hearing Officer may have given rise to an impression of a lack of objectivity in one or more of his comments during the Hearing, he did not refuse to summon the Hostler as a witness when the Claimant requested it. Furthermore, it appears from the statement of the record that the Organization's representative tried to impugn the fairness and lack of objectivity of this Hearing Officer from his tone of voice, something

which is difficult for anyone not present at the Hearing to verify. Also, there is a clear statement by the Claimant at the end of the Hearing that he had been allowed to have a representative of his choice present, for that representative to ask whatever questions he wished, and for the Claimant to present whatever witnesses he desired. Nor does the fact that the Hearing Officer was the Shop Superintendent who was advised of the complaint against Claimant on February 7 and who met with Claimant in his office on that date comprise unfairness in and of itself. Nor did the Organization voice any objection to the Hearing Officer at the time of the Hearing. On careful reading of the testimony of the Hearing as a whole, the Board finds that the Hearing was conducted in a reasonably fair and objective manner.

But it is chiefly with the claim that the Carrier failed to sustain charges filed against Claimant that we must concern ourselves. Certainly, there was conflicting evidence between the Foreman and the Claimant about what the Foreman meant when he said he was "clearing the employees off of here," as to whether the Foreman meant that he was clearing them off the entire track or just a specific unit (#155). Hostler Hawkins was not sure whether the Foreman had said "off of this track" or "off of that engine." Also, the Foreman heard Claimant's warning whistle; the pipefitter did not.

Aside from this conflicting evidence and the honest confusion that may have existed in three persons' minds as to the precise meaning of the foreman, there is the question of what Rule 26 requires. From the record of the Hearing and supporting documentation, management's position is that the employee violated Rule 26 when he removed the blue flag from one end of Track 3. However, the portion of Rule 26 that management cites, i.e., the 4th paragraph of Section (1), which states that "[W]hen blue signal protection has been removed from one entrance of a track with a switch at each end or from either end of rolling equipment on a main track, that track is no longer under blue signal protection[,]" does not appear to fit the facts in this situation. The Claimant moved Locomotive #155 out of Building M-19-A, exiting the facility in a westerly direction and away from other standing locomotives. The other two standing locomotives were to the east of the moving locomotive. Furthermore, the record shows that the employee did reposition the derail on the west end of the track after it was passed by Locomotive #155. There does not appear to be any requirement anywhere in Rule 26 for the employee to clear employees from all standing locomotives on Track #3 while Locomotive #155 was to be moved away. Section (1) of Rule 26 cited Sections (5) and (6) as exceptions to its ban on moving equipment in a blue signal area. The second paragraph of Section (1) also prohibits passing blue flags at the entrance of a track. Even paragraph 4, upon which the Carrier bases its case, mentions removal of blue signals from the entrance of a track with a switch at each end. However, Locomotive #155 was leaving the engine servicing area and thus Section (5) is the portion of Rule 26 that covers such situations.

The Organization contends that there is nothing in the record indicating that the Carrier had supplemented Rule 26(5)--which we find is the relevant Rule covering the locomotive movement at issue--with instructions requiring that all employees be cleared from all standing locomotives on Track 3 while Locomotive #155 was moved away from the standing locomotives, past the derail on the west end of the track (which Claimant protected by repositioning the derail on Track 3). We agree and find the Carrier has failed to demonstrate that the Claimant violated that portion of Rule 26 that applies to the facts of this case.

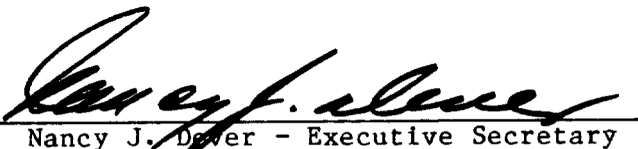
Claims that management violated Rule 35 and that it did not provide a fair and impartial Hearing are denied. Claim sustained inasmuch as the Carrier failed to provide clear and sufficient proof that the Claimant violated Rule 26. Claimant should be reinstated with rights provided under the contract.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of April 1992.